IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR.

J U D G M E N T

1. Smt.Harkori & Ors. vs. State of Raj. & Ors.

(S.B.Civil First Appeal No.32/1986)

2. State of Rajstahan vs. Pyare Lal

(S.B.Civil First Appeal No.23/1986)

Civil First Appeals under Section 96 C.P.C. against the judgment and decree dated 06.11.1985 passed by Shri P.S. Shukla RHJS, District Judge, Jhunjhunu in Civil Suit No.9/1982.

Date of Judgment :::::: April 13, 2006

PRESENT

HON'BLE MR.JUSTICE KHEM CHAND SHARMA

Mr.D.K.Dixit for the Plaintiff appellants.
Mrs. Nirmala Sharma, Dy. G.A. for respondents
(in SBCFA No.32/86)

Mrs.Nirmala Sharma, Dy.G.A. for appellants.
Mr.D.K.Dixit for respondent.
(in SBCFA No.23/86)

BY THE COURT (ORAL):-

Since both the appeals arise from a common judgment,

the same are being disposed by this common judgment.

The facts relevant for the disposal of these appeals in brief are that plaintiff-appellant filed a suit against the defendant respondents for recovery of Rs.11,000/- mentioning therein that he was awarded contract for constructing of Medical Quarters at Sultana vide work order dated 31.1.1979. As per the case of the plaintiff due to negligence on the part of the defendants, the work could not be completed within the prescribed period, which was extended time and again. The plaintiff alleged that as per the contract the work was to be completed up to 30.6.1979 but the defendants gave lay-out plan of the quarters only on 1.2.1979 and 28.2.1979. However, the time was extended and he started work and when the construction reached up to the level of masionary level, the same got demolished. For this, the plaintiff alleged that the concerned officers gave wrong section measurements. The plaintiff mentioned that in this way he suffered loss for no fault on his part. The plaintiff also alleged that time and again he requested the defendants to make payment time to time, to supply cement in time and also to supply detailed maps in time but no head was paid to his request. It was then mentioned that despite of the fact that he completed the work up to roof level, payment was not made due to which he had to

stop the work. Lastly, the plaintiff mentioned that the defendants deducted the amount of this contract from the amount of other contracts for which they had no authority. Thus, the plaintiff prayed for a decree of Rs.11000/- as per the details given in the plaint and also sought for a declaration that the defendants have no authority to deduct amount of one contract from another contract. The plaintiff sought a direction that the defendants be restrained from deducting any amount from the amount of another contract.

In the written statement, defendant respondents admitted the fact of award of contract to the plaintiff but denied the other facts mentioned by the plaintiff. The defendants came with this case that the plaintiff did not work as per their instructions and inspite of the fact that cement was supplied to him in time and payment according to the contract was also made in time he could not show the proportional progress in building the quarters. Therefore, 10% penalty was imposed upon him for delayed work. It was also the case of the defendants that the plaintiff did not comply with the provisions of Section 80 C.P.C. and that instead of filing the suit, the plaintiff should have resorted to the remedy of arbitration as per clause 23 of the contract.

On the basis of the pleadings of the parties, the learned trial court framed six issues.

In support of his claim, the plaintiff examined himself as PW.1 and also got examined Dhanna Ram PW.2 and Pitram PW.3 while Gajendra Singh Jain D.W.1, Bhagirath Mal, D.W.2, Banwari Lal DW.3 and K.S.Mathur DW.4 were examined from the side of the defendants.

The learned trial court after recording evidence of the parties and hearing both the parties and taking into consideration the evidence and material produced on record, decided issues Nos. 1 and 2 against the plaintiff holding that the plaintiff is not entitled to recover amount of Rs.11,000/- from the defendants but decided issues Nos.3,4 and 5 in favour of the plaintiff holding that the defendants had no authority to deduct the amount of one contract from the amount of another contract and thus, decreed the suit of the plaintiff to this extent vide impugned judgment and decree dated 6th November, 1985.

Feeling aggrieved of the impugned judgment rejecting the claim of the plaintiff to recover Rs.11,000/-, the plaintiff has filed S.B.Civil First Appeal No.32/1986 whereas feeling aggrieved of the findings on issues Nos.4

and 5, defendants have filed S.B.Civil First Appeal No.23/1986.

It is pertinent to mention here that the sole plaintiff Pyare Lal died on 30.4.1987. On an application having been filed under Order 22 rule 4 C.P.C. in S.B.Civil First Appeal No.32/1986, this Court vide order dated 11.8.1987 permitted to bring the Legal Representatives of the deceased plaintiff on record. However, no such application has been filed on behalf of the appellant State in S.B.Civil First Appeal No.23/1986. In such a situation the appeal filed on behalf of the State Government would have been dismissed in view of Order 22 Rule 4(3) C.P.C. but considering the short controversy involved in the matter, I have proceeded to decide both the appeals on merits.

Heard learned counsel for the parties.

Learned counsel for the plaintiff appellants contended that the learned trial court has wrongly appreciated the evidence of the plaintiff on issues Nos.1 and 2 and has has committed illegality in rejecting the claim of the appellants.

After hearing learned counsel for the appellant, I have gone through the impugned judgment and have scanned the material and evidence available on record.

Issue No.1 is related to the controversy whether in the facts and circumstances of the case, penalty could have been imposed upon the plaintiff. It was the case of the plaintiff that the defendant did not give him map of the building and before imposing penalty, no notice was given to him. It was also the case of the plaintiff that he wanted to finish the work in time and also issued letters in this respect to the defendants but the defendants did not give proper lay-out plan, the map of the building, supply cement, did not give proper measurements and also did not make payment within time due to which the plaintiff had to stop work. PW.1 Pyare Lal has stated that the department gave two lay outs and map and cement were not supplied on his demand. He has also stated that due to the mistake of the officers of the department, wrong construction was raised and on the instructions of Executive Engineer the wall was constructed again for which full payment was not made. He has also stated that the department itself extended the time but due to mistake on the part of J.En. work could not be completed in time. Thus, the case of the plaintiff was that there was no

breach of contract on his part. Hence, imposition of penalty was beyond the powers of the defendants. As against this from the evidence of DW.1 Gajendra Singh and other witnesses it is clear that they gave lay-out to the plaintiff and also supplied the maps of the building. From the evidence of DW.2 Bhagirathmal, DW.3 Banwari and DW.4 K.S. Mathur the defendants have been able to prove that cement was supplied to the plaintiff in time. From the evidence of DW.1 Gajendra and D.W.5 Om Prakash the defendants have also been able to prove this fact that the plaintiff raised not only wrong construction but also of inferior quality. These witnesses have also proved this fact that cement was provided to the plaintiff in time and bills were also sent time to time. Producing the documents Ex.A.1, A2, A8, A9,A10, A11, A13 and A15 the defendants have also been able to prove that the department provided assistance to the plaintiff time to time and he was also advised to finish the work in time and to execute the work in accordance with their directions but the plaintiff failed to carry out their directions. Thus, the defendants have been able to prove this fact that time of contract was extended and time to time they directed the plaintiff to execute the work in accordance with plans but the plaintiff has failed to execute the work as per the contract. Thus, the defendants have been able to prove that there has been

breach of contract on the part of the plaintiff for which he is liable to pay penalty. Regarding notice suffice it to say that by producing Ex.A-17 the defendants have been able to prove that so many letters were issued to the plaintiff to complete the work within the time and was also warned that if he failed to start the work within 10 days, action would be taken against him as per clauses 2 and 3 of the contract. Through Ex.A18 the plaintiff was also informed regarding the action proposed to be taken against him on his failure to comply with the terms of the contract. Thus, from the evidence produced on record, the plaintiff has not been able to prove issue No.1 and thus, the finding recorded by the learned trial court on this issue being in accordance with law, does not call for any interference.

Issue No.2 is as to whether the plaintiff is entitled to get Rs.11000/- from the defendants because of demolition of the construction raised by him, forfeiture of earnest money, interest accrued on the earnest money and damages as per the details enumerated in para 12 of the plaint ? As has been seen and discussed above, the plaintiff has not been able to prove that the construction raised by him was wrongly got demolished by the defendants on the other hand the defendants by producing DW.1 Gajendra Singh Jain, DW.5 Om Prakash and documents Ex.A.1 and A.2 have been able to

prove that the plaintiff did not work as per the drawings and also raised sub-standard construction. Thus, the finding of the learned trial court regarding the claim of the plaintiff for Rs.4200/- on account of demolition of the construction raised by him, cannot be said contrary to the evidence of the parties and does not call for any interference.

Sofar as the claim of the plaintiff to get refund of the security amount Rs.2888/- and Rs.1260/- interest accrued thereon as well as Rs. 2672/- as damages is, concerned, suffice it to say that the plaintiff would have been entitled to get the security deposits if he was entitled to get the same. In case, of breach of terms of the contract if the defendants were entitled to levy any penalty or recovery any damages, the plaintiff was not entitled to get refund of the security deposit and in that case, question of payment of interest would not arise. Regarding the claim of Rs.2672/- as damages, the plaintiff has come with this case that due to wrong lay out, the construction raised by him had to be demolished twice and therefore, he is entitled to get damages incurred by him in construction of the wall. As has been seen and discussed above, the plaintiff has not been able to prove this fact that due to wrong lay out, the construction raised by him

got demolished on the other hand the defendants have been able to prove that the plaintiff raised wrong and sub-standard construction despite repeated directions. Thus, the plaintiff cannot be said to be entitled to get Rs.2672/- by way of damages due to wrong construction. In this view of the matter, it must be concluded that the trial court has committed no error in rejecting the claim of Rs.2672/- to the plaintiff for the damages suffered by him due to wrong construction, which was got demolished.

For the discussions above, I find no substance in the arguments of the learned counsel for the appellants. The appeal filed by the plaintiff-appellants is, therefore, fails and is hereby, dismissed with no order so as to costs.

In the appeal filed by the defendants, learned counsel appearing for them contended that the suit of the plaintiff was not maintainable as there has been no compliance of Section 80 C.P.C. The second argument of the learned government counsel is that as per clause 13 of the contract, the plaintiff should have resorted the arbitration proceedings but without doing so, the plaintiff directly approached the learned trial court.

Learned trial court has considered and discussed the first argument of the learned counsel for the defendants in issue No.4. Learned trial court has observed that along with the suit, the plaintiff has filed an application under Section 80(2) C.P.C. for leave of the court for instituting the suit without serving the notice under Section 80 C.P.C. as the defendants were recovering amount from his another contract and notice under Section 80 C.P.C. will take considerable time. A notice of this application was given to the defendants. Although this application was neither allowed nor rejected by the trial court but by filing such application, the plaintiff has substantially complied with the requirement of Section 80 C.P.C. In the facts and circumstances of the case, and in view of the provisions of sub-section (2) of Section 80 C.P.C. I am of the opinion that there has been substantial compliance of Section 80 C.P.C. and thus, the suit of the plaintiff was maintainable. In this view of the matter, I find that the trial court has committed no error in deciding issue No.4 in favour of the plaintiff and against the defendants and as such, require no interference.

The issue as to whether in view of clause 13 of the contract, the suit of the plaintiff was not maintainable as he ought to have availed of the remedy of arbitration ?

learned trial court has considered this question while deciding issue No.5. Considering the fact that despite of several opportunities having been granted to the defendants, the defendants have failed to file their written statements. In such circumstances, the learned trial court placing reliance on the Division Bench judgment of this Court in the case of Gokul Chand vs. Bhonri Lal & Ors. reported in **1980 WLN 164** has observed that it was not obligatory on the part of the plaintiff to waste his time in such a proceedings. In this case, considering provisions of Section 34 of the Arbitration Act and Section 9 C.P.C. the Division Bench held that the litigant cannot be deprived of his right to approach court of law without there being a specific bar and without strict compliance with the provisions of Section 34 of the Arbitration Act. It was further held that the action of the defendant in seeking an adjournment for filing the written statement in the facts and circumstances o the present case constitutes a step in the proceedings, within the meaning of Section 34 of the Arbitration Act. In the present case, the defendants have failed to file their written statements for a long time despite several opportunities having been granted to them. Thus, the trial court has rightly observed that arbitration clause has no application and the plaintiff cannot be debarred from filing the suit

on that ground. As such I find no error in the finding of the learned trial court on this issue also.

No other point has been raised.

For the discussions above, the first appeal filed by the defendant-appellants also fails and is, hereby dismissed with no orders as to costs.

Both the appeals are dismissed as indicated above.

(K.C.Sharma),J.

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